In the Matter of Interest Arbitration Between Office of the Secretary of State and Illinois F.O.P. Labor Council	INTEREST ARBITRATION AWARD Case No. S – MA - 11240 Paul Lansing Arbitrator

APPEARANCES

For The Employer

Mark Bennett	Attorney
David Moore	Attorney
Steven Hennis	Personnel Office

For The Union

Richard Stewart, Jr.	Attorney
Gerry Lieb	F.O.P. Field Representative

A hearing in the above matter was held on April 15, 2011, in Springfield, Illinois, before the undersigned Arbitrator. During the hearing, both the Employer and the Union were given full opportunity to provide evidence and argument. Both parties requested the opportunity to file post-hearing briefs and both were received by June 20, 2011.

I. FACTS

The Office of the Secretary of State (hereinafter "the Employer") and the Illinois Fraternal Order of Police Labor Council (hereinafter "the Union") have a Collective Bargaining Agreement which covers the time period of July 1, 2004 through June 30, 2009 (Employer Exhibit #1). This interest arbitration dispute is solely in regard to issues relating to wages under an updated Agreement.

On March 9, 2009, the Union filed a formal notice of demand to bargain, and negotiations began between the Union and the Employer on June 23, 2009. Prior to October 2010, the Parties met eleven more times between June 29, 2009 and August 5, 2010. From June 30, 2010 to August 5, 2010, the Parties met three times with the assistance of a mediator.

On September 3, 2010, after the third mediation session, the Union made the following suggestion for resolving the wage issue:

Union Package Proposal:

Year one: 1% on steps year 4 through 29 on January 1, 2010
Year two: 1% on steps year 4 through 29 on January 1, 2011
Year three: 7/1/11 steps year 4 through 29 renumbered to step year one through 26
Longevity language deleted from contract, steps remain
1% on steps year 1 through 26 on January 1, 2012
Year four: 7/1/12 – 2.75% pension pick-up moved to base and then employer deducts pension from employee's checks

The Employer responded via email on October 8, 2010. The Employer proposed the following:

Employer Wage Proposal:

Effective 1/1/10 – 1% across the board increase;
Effective 1/1/11- 1% across the board increase;
Effective 7/1/11 - Steps 4 -29 renumbered to steps 1 – 26 to correspond with years of service, longevity bonus language deleted from agreement and longevity bonus eliminated;
Effective 1/1/13 – 1% across the board increase.

The Union countered the Employer's proposal on October 20th, 2010. In an email from Gerry Lieb, the Union suggested the following:

Union Package Proposal:

Year one: 1% on Schedule A steps year 4 through 29 on January 1, 2010
Year two: 1% on Schedule A steps year 4 through 29 on January 1, 2011
Year three: 7/1/11 Schedule A steps year 4 through 29 renumbered to step 1 through 26 to correspond to years of service
Longevity language deleted from contract, steps remain

By November 12, 2010, the Union had not received any response to its October 20, 2010 email. Gerry Lieb sent an email to Mark Bennett to get a status update. On November 16, 2010, Mark Bennet responded by email the following:

Agree to FOP Proposal: Three Year Agreement:

Effective 1/1/10 – 1% across the board increase;
Effective 1/1/11- 1% across the board increase;
Effective 7/1/11 - Steps 4 -29 renumbered to steps 1 – 26 to correspond with years of service, longevity bonus language deleted from agreement and longevity bonus eliminated.

The Union responded on November 23, 2010, that it looked like the Parties had a tentative agreement. Bennett testified that after he received Lieb's November 23, 2010 email, he understood that the Parties had reached a tentative agreement.

On November 30, 2010, after the tentative agreement had been reached between the Parties, Lieb emailed to Bennett a draft CBA and draft wage schedule (Employer Exhibit #9). Herein lies the controversy over what the substance of the tentative agreement regarding various wage issues meant. In the draft CBA, Lieb had deleted the paragraphs addressing the longevity bonuses. In addition, the calculation of the 1% pay raises scheduled for January 1, 2010 and 2011 came into question.

On December 10, 2010, Lieb sent Bennett another version of the CBA and wage schedule that Lieb said "we will use to sign off on" (Employer Exhibit # 12). Bennett, however, had not reviewed these documents yet. On January 6, 2011, Bennett sent Lieb a revised version of the CBA. Bennett wrote in part:

> "Our Article 40s differ somewhat...but given our subsequent agreement on economics to eliminate longevity altogether at the time we renumber to (sic) wage scale, I thought it might make sense to leave them with the caveat that they both go away in 2011..."

On January 8, 2011, Lieb responded to Bennett by email (Employer Exhibit #18). Lieb wrote, in part:

> "I found some deviations from the TA in this article. ...You accepted the Union's (*sic*) final proposal on wages which state increased in year one and 2 would be on January 1, 2010 and January 1, 2011, across the board, which means on steps year 4 through year 29. We agreed to the step compression in year 3 moving years 4

through years 29 to years 1 through 26. We then agreed along with those changes to eliminate the sections on longevity ..."

On January 10, 2011, Bennett responded to Lieb by email. With respect to wages, Bennett wrote: "I am not sure how our language is not consistent with the TA and I don't understand your changes..."

Bennett also wrote: "The wage matrix I included in our draft was the matrix attached to your draft. So I am not sure what your concerns are here." Bennett testified at the hearing that he had assumed the wage calculation in Lieb's wage schedule were consistent with the Parties' tentative agreement, but Bennett had not calculated the figures himself (Transcript 108-09).

On January 12, 2011, Lieb and Bennett spoke by telephone. Bennett told Lieb that the Union's wage schedule did not reflect the tentative agreement that at the same time the steps were renumbered, the longevity bonuses would be eliminated in their entirety. Lieb responded that the Union's wage schedule was correct and that only the longevity language was to be deleted, not the longevity increases.

II. ISSUES

The Partites submitted the following economic issues to the Arbitrator for resolution:

1) Whether the Parties' tentative agreement was that the agreed to one percent (1%) increases on January 1, 2010 and the January 1, 2011 would, as

the Employer argues, apply only to the Investigators' base salary, or as the Union argues, apply to both the Investigators' base salaries and longevity bonuses.

2) Whether the Parties' tentative agreement was, as the Employer argues, that the existing longevity bonuses would be eliminated in their entirety effective July 1, 2011, or, as the Union argues, that the longevity bonuses would be rolled permanently into the Investigators' base salaries, effective July 1, 2011.

III. POSITION OF THE EMPLOYER

The Employer position is that the Parties had a meeting of the minds and a tentative agreement regarding the longevity bonuses and pay increases. The Parties' objective conduct established that this meeting of the minds occurred and a tentative agreement was reached on November 23, 2010 when Lieb told Bennett "we have a tentative agreement" in response to Bennett's November 16, 2010 proposal to eliminate the longevity bonuses entirely effective July 1, 2011.

The Employer notes that Bennett notified Lieb that the Secretary would renumber the steps only if longevity bonuses were eliminated at the same time, in order to offset the costs of renumbering the steps. In the Secretary's final November 16, 2010 counter proposal, Bennett wrote: "Longevity bonus deleted from agreement and longevity bonus eliminated effective July 1, 2011, when the steps are renumbered." Therefore, the plain

and ordinary meaning of the Employer's last proposal was to eliminate the longevity bonus. When Lieb notified Bennett that "we have a tentative agreement" on November 23, 2010, he did not make any qualifications regarding the Employer's proposal to eliminate the longevity bonuses.

Therefore, the Employer claims that the Parties' objective conduct establishes that:

a) the Employer clearly communicated that it would only agree to renumber the steps if the longevity bonuses were eliminated at the same time;

b) the Union accepted the Employer's written proposal to eliminate the longevity bonuses, and;

c) therefore, a meeting of the minds occurred and a tentative agreement was reached to eliminate the longevity bonuses.

The Employer anticipates that the Union would argue that Lieb's subsequent draft CBAs and wage schedules constituted rejections and counter offers to Bennett's November 16, 2010 offer and that Bennett accepted the counter offers by including the Union's wage schedule in a subsequent revision to the draft CBA, before the Employer verified the wage schedule's accuracy. The Employer's response to this is that "counter offers made after contract formation have no effect on the contract's validity." Since the tentative agreement regarding the elimination of the longevity bonuses had already been formed when Lieb said in his November 23, 2010 email "that we have a tentative

agreement," the Parties' communications after November 23, 2010, were nothing more than attempts to memorialize their tentative agreement.

Regarding the other issue, the Employer's position is that their proposal to apply the January 1, 2010 and 2011 across the board increases to base salaries only should be affirmed. In support of their position, the Employer relied upon the testimony of Amanda Trimmer, the Acting Director of the Budget and Fiscal Management Department, who testified that she personally prepared the salary schedule in 2006, at the conclusion of the prior interest arbitration. Trimmer testified that the pay increases under the prior CBA were applied to base salaries only and not to longevity bonuses. Trimmer calculated the "salaries w/ differential" listed on the salary scheduled after each pay increase by first subtracting the $1500 or $3000 longevity bonuses from the current "salary w/ differential" to determine the base salary, then increased that base salary by the required percentage, and then added the $1500 or $3000 longevity bonuses back on top of the new base salary to determine the new "salaries w/differential." Therefore, the Parties' past practice has been that pay increases apply to base salaries and not to longevity bonuses.

Alternatively, the Employer maintains that even if the Parties did not have a meeting of the minds, the Employer's Final Offer should be adopted because it more nearly complies with the applicable statutory criteria. The Employer proceeds to review Section 14(h) of the Illinois Public Labor Relations Act which sets forth the relevant interest arbitration criteria where there is no agreement between the Parties and wage

rates are in dispute. As is usual, most of the discussion here refers to comparability and financial ability to pay.

IV. POSITION OF THE UNION

The Union position is that there was a tentative agreement between the Parties but disagrees with the Employer as to how and when this came about. The Union looks to the October 20, 2010 proposal it made to the Employer as the foundation of the agreement between the Parties. As to wages, the Union there proposed 1% on January 1, 2010 and 2011. On July 1, 2011, Schedule A steps would be renumbered, the longevity language would be deleted from the contract and the steps would remain.

On November 16, 2010, Bennett sent Lieb an email stating that the Parties "have agreement of all issues" except the Specialty Stipend and the District 1 residency. The Union believes that based upon that email, the Employer had in the words of Bennett "agreement" on wages. The Union responded on November 23, 2010 that it looked like the Parties had a tentative agreement. Since the Union did not have to make any changes to the wage proposal, the Employer already agreed to the Union's offer.

The Union argues that the across the board language of the Employer's proposal applies to all monies in Schedule A of the Collective Bargaining Agreement. So, whether that money included longevity pay or not was not considered by the Union, only that the 1% increase was to be across the board.

On November 30, 2010, the Union sent the Employer a draft of the Agreement that contained the Wage Matrix as the Union had proposed (Union Exhibit #27). The Employer responded on January 6, 2011 with the same Wage Matrix but suggested language changes to the wage article. As of January 10, 2011, the Employer had no issue with the Wage Matrix as presented by the Union. For the Union, this clearly indicates that the Employer had agreed to the Union position by their agreement to the Union Wage Matrix.

Just as the Employer had done, the Union offered that alternatively, the Union maintains that even if the Parties did not have a meeting of the minds, the Union's Final Offer should be adopted because it more nearly complies with the applicable statutory criteria. The Union also proceeds to review Section 14(h) of the Illinois Public Labor Relations Act which sets forth the relevant interest arbitration criteria where there is no agreement between the Parties and wage rates are in dispute. Again, most of the discussion here refers to comparability and financial ability to pay.

V. DISCUSSION

It is interesting to note that from September 3, 2010 forward, all the communications between the Parties occurred through electronic mail. While electronic mail offers a convenient means of communication, it does not allow for a full communication that face-to-face or telephone conversations encourage. The dispute here

reminds me of a first year law school contracts class where issues about offer and acceptance, and objective intent need to be addressed. The Parties reliance upon electronic mail recalls classic cases of a hundred years ago where the post office was the only means of communication.

The Parties disagree about when offer and acceptance took place in this dispute. While they both agree that a tentative agreement was completed, the Union maintains that a tentative agreement was reached on November 16, 2010 when Bennett sent Lieb an email, responding to the Union's email of October 20, 2010. The Employer maintains that a tentative agreement was completed on November 23, 2010 when the Union notified the Employer that there was a tentative agreement. The Employer's position is that the November 16, 2010 email was a counter proposal and that there was no tentative agreement at that time.

The first issue that need to be determined here is:

1. Whether the Parties' tentative agreement was that the agreed to one percent (1%) increases on January 1, 2010 and January 1, 2011 would, as the Employer argues, apply only to base salaries or, as the Union argues, apply to both base salaries and longevity bonuses?

The Union relies on the fact that starting with the October 8, 2010 email from the Employer, the proposal stated the following:

Effective 1/1/10 – 1% across-the-board increase;

Effective 1/1/11 – 1% across-the-board increase;

By using the words "across-the-board", the Union believes that reference is made to Schedule A of the Collective Bargaining Agreement. Schedule A includes the longevity bonus and therefore the Union believes the "across-the-board" language applies to the longevity bonuses. In fact, the Union notes that this issue only came about the morning of the arbitration hearing when the Employer raised this issue.

The Employer believes that the across-the-board language was to apply to base salaries only. The Employer relies upon the testimony of Amanda Trimmer, who stated that she personally prepared the salary schedule (Schedule A) in 2006, at the conclusion of a prior interest arbitration. Trimmer testified that the pay increases under the prior CBA were applied to base salaries only and not to the longevity bonuses. Therefore, the Parties' past practice had been that pay increases apply to base salaries and not to longevity bonuses.

In light of past practice between the Parties, I think it reasonable to accept the Employer's position that "across-the-board" was intended to apply to only base salaries and not to longevity bonuses. It was incumbent upon the Union to more specifically note this in their negotiations with the Employer. To change past practice between the Parties places the burden on the moving party to clearly demonstrate that both Parties understood and agreed to the change in past practice. This was not done here.

The Union's reliance on the Union prepared Wage Scale, and there being no objection from the Employer until the arbitration hearing, does not legitimize their position. The Union had the opportunity to clearly state their intention to apply the 1% across-the-board raise to both base salaries and longevity bonuses but did not do so.

The second issue that needs to be determined here is:

2. Whether the Parties' tentative agreement was, as the Employer argues, that the existing longevity bonuses would be eliminated, effective July 1, 2011, or, as the Union argues, that the longevity bonuses would be rolled permanently into base salaries, effective July 1, 2011?

The Employer notes that neither party initially proposed any substantive changes to the longevity bonuses. In August 2010, the Employer notified the Union that it would consider renumbering the steps if the Union agreed to eliminate the longevity bonuses at the same time. The Employer believed that the *quid pro quo* for the Employer's willingness to renumber the steps was the Union's agreement to eliminate the longevity bonuses entirely.

In support of this, the Employer notes that on September 3, 2010, the Union emailed the Employer with a proposal that stated: "...longevity bonus language deleted from the contract..."

On October 8, 2010, the Employer responded in their proposal: "...longevity

bonus language deleted from the agreement and longevity bonus eliminated..."

Bennett testified that he added "and longevity bonus eliminated" because the Union proposal did not sufficiently characterize the Employer's proposal to eliminate the longevity bonuses entirely.

On November 16, 2010, Bennett emailed Lieb a counter-proposal which included the same language above. As previously noted in this section, the Union maintains that the Employer's November 16, 2010 response completed a tentative agreement between the Parties.

On November 23, 2010, Lieb emailed Bennett and stated: "It looks like we have a tentative agreement." Regardless of whether a tentative agreement was reached on November 16 or November 23, 2010, the language of November 16, 2010 clearly states that the longevity bonus will be eliminated. Objectively, there can be no other interpretation of the language written but the intent to eliminate the longevity bonus.

The fact that the Union prepared a Wage Scale Matrix that continued to include the longevity bonus does not override the intent of the Parties through the language of the tentative agreement.

VI. AWARD

The Employer's final offer to apply the agreed to one percent (1%) increases on January 1, 2010 and January 1, 2011 to base salaries only (and not to longevity bonuses) and to eliminate the longevity bonuses in their entirety, effective July 1, 2011, are adopted in this Award.

Paul Lansing

July 8, 2011
Champaign, Illinois

Paul Lansing
Arbitrator